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IN THE

# Supreme Court of the United States

October Term, 1949

No. 358

**J. S. CASSELMAN, JAMES D. TOWNE, J. E. ABEL AND GEORGE HILL,**

*Petitioners*

v.

**STATE OF IDAHO**

## PETITION FOR REHEARING

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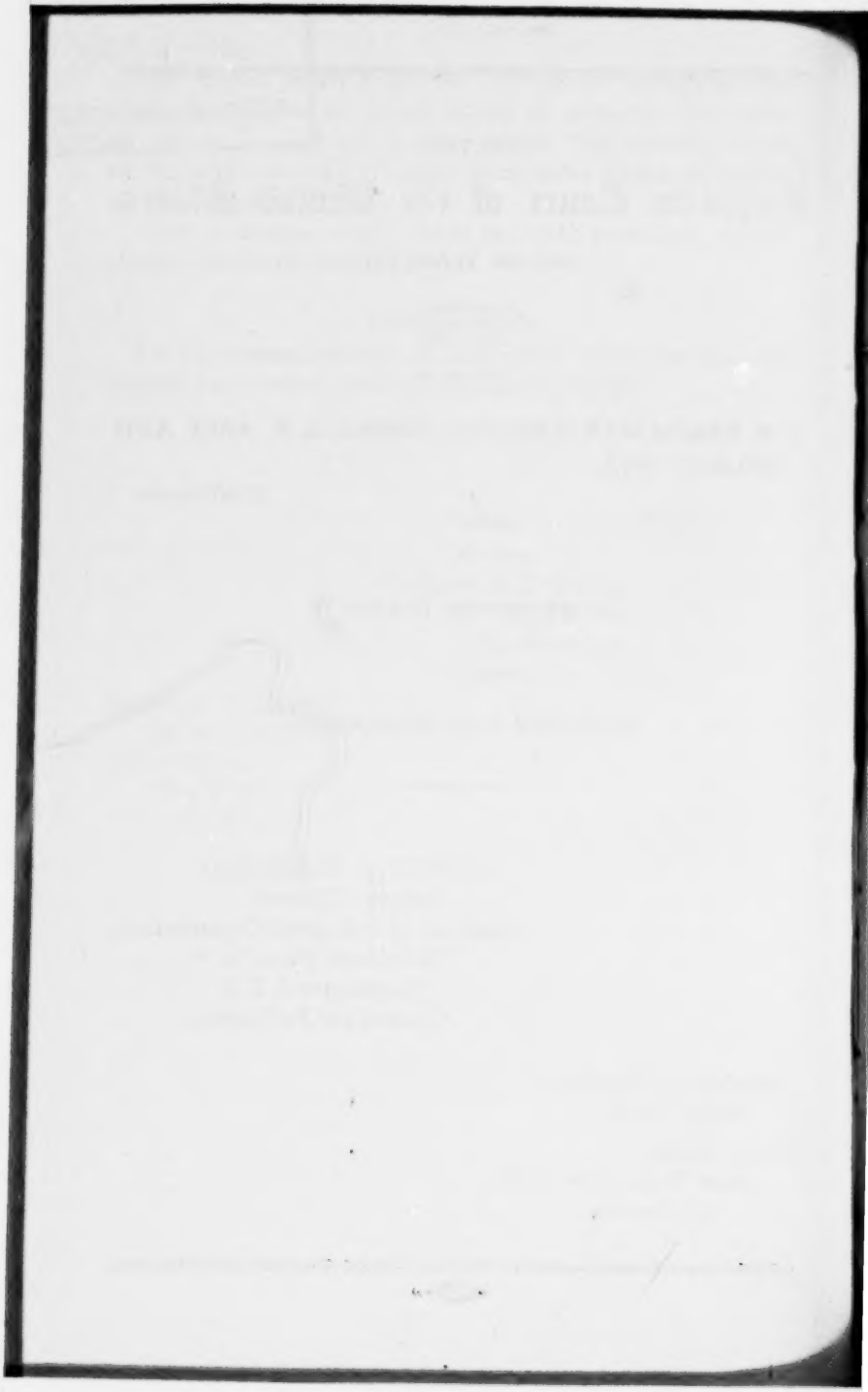

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## PETITION FOR REHEARING

J. S. Casselman, James D. Towne, J. E. Abel and George Hill, the petitioners herein, pray that the court reconsider its denial of their petition for certiorari and, on rehearing, grant said petition.

The petition for certiorari was filed on September 29, 1949. It was denied on December 12, 1949. On December 22, 1949, the Chief Justice extended the time in which to file a petition for rehearing to and including January 9, 1950.

### GROUNDS UPON WHICH REHEARING IS ASKED

The petitioners present herein three separate grounds for rehearing of their petition for certiorari:

(1) The granting of the petitions for certiorari in Nos. 309, 364 and 449 in which the same constitutional issues sought to be raised herein are presented.

(2) The actions of the subsidiaries of American Telephone & Telegraph Company taken on or about November 21, 1949, while the petition herein was pending, which clearly show

the integrated employment practices of the Western Electric Company, the petitioners' nominal employer, and the Mountain States Telephone & Telegraph Company, the "third person" whose injury made the petitioners peaceful picketing a crime under the Idaho statute.

(3) The fact that Mr. Justice Douglas was absent and three of the eight justices participating noted their dissent from the denial of the petition for certiorari, which fact, we submit, should provide a basis for a rehearing of the petition before a full bench.

None of these three points have previously been presented to the court and this petition, therefore, complies with the provisions of Rule 33 (2) of the Rules of this Court.

## I.

The granting of the Petition for Certiorari in Nos. 309, 364 and 449 is a proper basis upon which to grant the petition for certiorari herein. It will be recalled that the Idaho statute, under which the petitioners were criminally convicted because of their peaceful picketing, provides that "It shall be unlawful to cause . . . injury to one not a party to the particular labor dispute, . . . by picketing." These words, selected from the statutory context by the Supreme Court of Idaho (R. 48), define the offense for which the petitioners were tried and convicted. In the petition for certiorari, it was contended that this statute violated the 14th Amendment because, among other things, (1) it made all effective picketing unlawful in the absence of a "labor dispute" as defined by state law (Petition, pp. 6-11); (2) it made peaceful picketing unlawful, even where there was a "labor dispute," if the picketing had the effect, intended or unintended, direct or indirect, of causing injury to a third person, irrespective of the industrial or economic relationship, of that third person to the employer involved in the labor dispute (Pet., pp. 11-13).

On December 19, 1949 the court granted certiorari in three cases: *International Brotherhood of Teamsters* v. *Hanke,* No. 309; *Automobile Drivers* v. *Cline,* No. 364; *Building Service Employees* v. *Gazzam,* No. 449. Counsel for the petitioners, in the time made available by the court,

have examined the papers in these three cases. All three seem to raise one common point: whether a state may, consistently with the 14th Amendment, enjoin picketing for the sole reason that there is no labor dispute, as defined by state law, involved.

This is the only "Question Presented" by the petitioners in the *Hanke* case (Petition, No. 309, pp. 7-8); it is the only "Question Presented" by the Petitioner in the *Cline* case (Petition, No. 364, p. 8); it is the first of the "Questions Presented" by the petitioner in the *Gazzam* case (Petition, No. 449, p. 8).

The three cases, of course, present differing factual backgrounds. But in each of them peaceful picketing was restrained by the state court because of the absence of an immediate relationship of employer and employee between the picketers and the person picketed, and certiorari was requested on the ground that the prevention of peaceful picketing by law under such circumstances constituted a violation of the Fourteenth Amendment.

The present case presents exactly the same question. This case differs only in that the restraint on peaceful picketing here involved is more serious and more inclusive. Here the restraint is not civil, but criminal. Here there is no warning to the picketers but the imposition of criminal penalties after the event. Here the picketing restrained is not only picketing in the absence of a "labor dispute," but also the picketing of persons who are involved in a labor dispute, if any one else is injured thereby. Indeed, the petitioners here were convicted of crime although they peacefully picketed the premises in which they worked and in which their employer, with whom they had a "labor dispute," had headquarters.

There is one other apparent difference between the instant case and the cases now before the court. The injunctions in Nos. 309, 364 and 449 were directed at picketing *per se*. In the instant case, the statute does not make picketing criminal, but the causing of injury by picketing. This difference, however, is immaterial. As we pointed out in our petition, all picketing which is effective causes economic injury and injury must usually be shown before picketing *per se* may be enjoined. Injury in fact was shown in *A. F. of L.* v. *Swing*, 312 U.S. 321

and *Cafeteria Employees* v. *Angelos*, 320 U.S. 293, but the picketing was nevertheless held constitutionally protected. Injury was also shown in No. 309 (R. 17), in No. 364 (R. 7), and in No. 449 (R. 172). And, in each of these cases, the injury to a person not party to a "labor dispute" was, in fact, the basis for the prohibition of peaceful dissemination of information by picketing.

The constitutionality of such a prohibition is the question now before the court. The identical question is presented in the instant case. In the instant case, the question arises in more aggravated form—because the punishment is criminal, comes without warning and is applicable even where there is a labor dispute—but the question is the same.[1] This, we submit, is a sufficient basis for the granting, on rehearing, of the petition for certiorari in the instant case, *Triplett* v. *Lowell*, 296 U.S. 570, 297, U.S. 638; *Pickett* v. *Union Terminal Co.*, 314 U.S. 704, 315 U.S. 386, 394; *United States* ex rel *Eichenlaub* v. *Watkins*, 337 U.S. 955. Indeed, even if the question in this case be regarded as only "related" to the questions presented in the cases now before the Court, this is a sufficient ground upon which to grant the petition for rehearing.[2]

## II.

There were three parties involved in the picketing which led to the petitioners' conviction. There were (1) the petitioners, (2) their employer, the Western Electric Co., and (3) the "third person," the Mountain States Telephone and Telegraph Co. (1) and (2) had a labor dispute. Picketing by (1) in connection with that dispute caused injury to (3), "not a party

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[1] The existence of a statute in the present case makes, of course, no difference in the constitutional question presented. It has never been suggested that action forbidden to a state by the Federal constitution may be taken by the legislature but may not be taken by the courts of the state on common law principles. To the contrary, it was not until *A. F. of L.* v. *Swing*, 312 U.S. 321, and *Shelley* v. *Kraemer*, 334 U.S. 1, that it was established beyond doubt that constitutional limitations on state action were applicable to judicial action with the same force as they are applicable to legislative action.

[2] See Boskey, *Mechanics of the Supreme Courts' Certiorari Jurisdiction* (1946), 46 Columbia Law Review 255, 261.

to the particular labor dispute," and hence was criminal under the Idaho statute.

In our petition we urged that this picketing was in fact picketing of the Western Electric Co. by its own employees who were in dispute with it, and that the ruling of the Idaho Supreme Court that such picketing was nevertheless illegal because the petitioners "had no right to picket in such a way as to injure someone else not a party to the labor dispute" was an unconstitutional limitation on freedom of speech. We also urged that, even if it be considered that the petitioners were in fact picketing the third party, the Telephone Co., such picketing was certainly within "the industry within which a labor dispute arises" (*Carpenters & Joiners* v. *Ritters Cafe,* 315 U.S. 722, 728), if any picketing ever could be said so to be, since the petitioners were employed on Telephone Co. property, installing equipment to be used by the Telephone Co., by a corporate affiliate of the Telephone Co., in a division devoted solely to such installation.

This attempt to separate the picketing analytically into either picketing of the Electric Co. or picketing of the Telephone Co. was perhaps unnecessary. Certainly the Idaho statute, on its face and as interpreted, does not make the criminality of picketing depend on who is picketed. The sole ingredients of the crime are picketing and injury to a third person. The nature of the picketing and the words on the picketers' placards are immaterial. But the analytical separation did tend to obscure the important fact that, in a substantial and economic sense, the opponent with which the strikers were in economic combat was neither the Telephone Company nor the Electric Company but the Bell Telephone System. It is not merely that the Telephone Company and the Electric Company were both subsidiaries of American Telephone & Telegraph Company (*Ritter's Cafe,* 315 U.S. 722 shows that common ownership is insufficient to constitutionally protect picketing in the absence of an industrial connection). Nor is it only that both subsidiaries are engaged in an integrated industrial enterprise (*Ritter's Cafe* and the *Wohl* case, 315 U.S. 769 would seem to show that this *is* sufficient to confer constitutional protection). Of even more significance is the

fact that employment and conditions of employment throughout the subsidiaries Bell System are completely integrated.

It is not true, as the petition may have made appear, that employment by the Electric Co. and employment by the Telephone Co. were entirely separate, and that picketing of the Telephone building by employees of the Electric Co. could only be constitutionally justified because (a) the Telephone building housed the Electric Co. and (b) the two companies were engaged in the same industry. On the contrary, wages and conditions of employment in any Bell subsidiary are of direct interest to all employees of Bell because these subsidiaries do not have independent policies but mechanically carry out the dictates of the real employer, the Bell System. The petitioners had a right to regard themselves as employees of the Bell System, to regard their strike as a strike against the Bell System, and to picket the Bell System as such in support of their strike. Settlements of disputes as regards wages and conditions of employment are substantially uniform throughout the Bell System. Employees are given the right to transfer freely from one subsidiary to another, retaining their service benefits, service records and seniority. (R. 13.) The booklet "For Your Information" [3] given to workers employed in the Installation Department of the Electric Company informed them that "having entered the Western Electric Company, you have become a member of the Bell System." The advertisement "Up From the Ranks" published by the "Bell Telephone System" demonstrates graphically that employees were in substance employees of the System, not of the subsidiaries.[4] The financial statement of the American Telephone & Telegraph Company[5] speaks at length of the employees of the Bell System and describes how the Bell System, as such,

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[3] Exhibit C, on file with the clerk.

[4] Exhibit D, on file with the clerk. This exhibit shows that Walter S. Gifford "started as a clerk with the Western Electric Co.," the President of the *New Jersey* Telephone Co. started as a clerk in *Boston*, the President of the *Wisconsin* Co. started with a *New York City* subsidiary, the President of *New England* subsidiary started in *Atlanta*, the President of the *New York* Co. started in *San Francisco*. All are described as employees of "the Bell System" who came up from the ranks.

[5] Exhibit A, on file with the clerk.

concluded a wage settlement in 1946 covering the entire system.

These facts were underlined in November 1949, while the petition for certiorari herein was pending. At that time the employees in several of the Bell Systems' subsidiaries were engaged in bargaining sessions with their nominal employers. One of the subjects of bargaining was pensions. On November 21, 1949, every one of the Bell subsidiaries, including the Electric Co. and the Mountain States Telephone Co., issued letters, identical to the last comma, announcing a unilateral change in the Bell System pension plan, and making no reference to the then pending negotiations.* That this unilateral action was a blatant unfair labor practice is not material here. What is material is that it shows again, and most clearly, that on matters of employment policy in the Bell System, the nominal corporate employer is of no significance. All employees of the operating and installation subsidiaries of the Bell System are practically and economically employees, not of the subsidiaries, but of the Bell System. And they have a common interest in matters relating to wages and conditions of employment throughout the System.

This fact, which we heretofore failed to emphasize, is a sufficient basis on which to grant certiorari herein on rehearing. The petitioners had a dispute with the Bell System. They struck against the Bell System. They peacefully picketed the Bell System. Yet, Idaho has prosecuted them criminally for that act because of the Bell System's internal corporate division, in spite of the fact that employees of the corporate subdivisions are, on matters of interest to strikers and picketers, in substance employees of the System. Since the petitioners were, in practical effect, employees of Bell, subject to Bell's employment policy, receiving Bell's wages and Bell's pensions, they had a right to strike not only against the corporate dummy but against their real employer, Bell. And they did so strike. To permit a state to punish the petitioners for the peaceful dissemination of the information that such a strike was in progress is exactly the same as permitting the prohibi-

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*New York Times*, Nov. 22, 1949, page 1, col. 2; *Daily Labor Report*, No. 225, Nov. 21, 1944, p. A-3.

tion of picketing against an employer unless every one of his divisions or departments are on strike. Unless the Court is prepared to abandon its whole line of decisions with regard to picketing, such a ban should not be allowed to stand against constitutional attack.

## III.

The order of the Court on December 6, 1949 denying the petition for a writ of certiorari in this case carried the notation that Mr. Justice Black, Mr. Justice Reed and Mr. Justice Burton were of the opinion that the writ should be granted. The orders of the court also noted that Mr. Justice Douglas took no part in the consideration of the cases in which orders were that day announced. We respectfully suggest that this combination of factors constitutes a proper basis upon which to grant a rehearing, before a full bench, of the court's action on the petition for certiorari herein.

The procedure of the court in dealing with petitions for certiorari is prescribed neither by statute nor by rule. The court is free to grant petitions for certiorari only in those cases in which a majority desire the writ to be granted, or, if the court so desires, in all cases in which two or three Justices vote to bring the case before the court. The action in granting the petition for certiorari under either practice is the action of the court as a whole. It may please the court to grant the writ because two or three members so desire, or it may please the court to take such action only when four or even a majority so desire. In no case would a litigant have a right to demand that another rule be followed, since the court as a whole has perfect freedom to determine in what cases it will accede to the wishes of a minority of its members.

We do not, accordingly, urge that the absence of Mr. Justice Douglas, when combined with the announced votes of Justices Black, Reed and Burton in favor of the writ, gives us any right to ask for a rehearing. We do wish, however, respectfully to call certain facts to the court's attention and to suggest that in cases such as this a rehearing before a full bench would not do violence to the court's traditions—insofar as they are known to the petitioners—but would, on the con-

trary, conform to the announced principles upon which the "rule of four" is based.

Our knowledge of the court's practices is, of course, limited because the opinions of the Justices as to whether certiorari should be granted are often not announced and because the court has announced no set of rules which govern it in the exercise of its discretionary powers. The basis for the "rule of four" has, however, been officially announced on several occasions.

In hearings before the Senate Committee on the Judiciary in 1924, Mr. Justice Van Devanter, speaking as a member of the Committee of the Court, stated that "whenever the vote is relatively close the conference makes it a practice to grant the petition." In response to a query as to whether this was true when a majority were against the grant, he said: "Yes. For instance, if there were five votes against granting the petition and four in favor of granting it, because we proceed upon the theory that when as many as four members of the court, *and even three in some cases,* are impressed with the propriety of our taking the case the petition should be granted." [7] (Italics added.) In 1928 Mr. Justice Stone said that "Petitions for certiorari are granted on the affirmative vote of four of the nine Judges." [8] In 1935, Mr. Justice Van Devanter, again speaking on behalf of a Committee of the Court, stated the reason behind the rule: "The point is that in exercising the certiorari jurisdiction on the Court desires to be at fault in taking jurisdiction rather than to be at fault in rejecting it." [9]

This rationale would seem to suggest that, when less than nine Justices participate in the decision to grant or deny certiorari, rigid adherence to the requirement that four votes are necessary for a grant would be inappropriate. Thus, if only seven or six Justices participate, the purpose of the "rule of four" would seem best served by a "rule of three" so that certiorari would be granted, in Mr. Justice Van Devanter's words, "whenever the vote is relatively close."

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[7] Hearings before the Committee on the Judiciary, United States Senate, on S. 2060 and 2061, 68th Cong., 1st Sess. page 29.

[8] 14 American Bar Ass'n Journal 428, 436.

[9] Hearings before the Committee on the Judiciary, United States Senate, on S. 2176, 74th Cong., 1st Sess., pp. 9-10.

In the present case eight Justices participated. We do not urge that in such cases the vote of three should be sufficient to grant certiorari. But we do suggest that where three Justices are of the opinion that certiorari should be granted and where the ninth Justice is temporarily absent from the bench, the purpose of the "rule of four" would be served if the court should, on application, rehear the petition for certiorari before the full court.

We are not urging, be it noted, that the absence of a Justice is a proper basis upon which to request a rehearing of a decision by the Court on the merits, although the granting of the petition for rehearing in *Marzani* v. *United States*, 336 U.S. 910, might be argued to be precedent for such a contention. We recognize that litigation must be ended and that the court's work cannot be suspended because of the absence of a Justice. We recognize, furthermore, that the Judicial Code, in providing that six Justices shall constitute a quorum (28 U.S.C. 1) provides, in effect, that a Court so constituted shall be competent to finally determine the matters before it despite the absence of one or more members.

But the action of the court in granting or denying a petition for certiorari is a different matter. As the court itself has frequently pointed out, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case" (*United States* v. *Carver*, 260 U.S. 482, 490). The decision to grant certiorari similarly does not imply a decision on the merits. It is, simply, an exercise of the Court's discretionary power to hear the case on the merits. In exercising that discretion, the Court has the greatest flexibility and we suggest, respectfully, that in all fairness to litigants before the Court the temporary absence of one Justice should be a proper basis upon which to grant a rehearing before the full bench where the vote of that Justice will be decisive as to the granting or denial of the writ.[10]

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[10] Insofar as we are aware, this suggestion has never been passed upon by the Court. In a number of cases before a full bench, three Justices have noted that in their opinion the writ should be granted. See, e.g., *Simmons* v. *Peavy-Welsh Lumber Co.*; *Helvering* v. *Sprouse*, 315 U.S. 810. In at least two cases such opinions have been noted when only eight Justices participated. *Scarborough* v. *Pennsylvania R. R.*, 326

## CONCLUSION

For the reasons stated it is respectfully submitted that this petition for rehearing should be granted and, on rehearing, certiorari should be granted.

Respectfully submitted,

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I certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Par. 2 of Rule 33 of the Rules of this Court.

Arthur J. Goldberg

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U.S. 755; *International Union* v. *United States*, 338 U. S. 871. In the latter case, Mr. Justice Clark presumably disqualified himself, since he was on the bench at the time the petition was ruled on. In the former case, Mr. Justice Jackson was absent during the entire term of Court in which the petition was acted upon and, in any event, no request for a decision by a full court was made in the petition for rehearing.